RICHARD BARGEN

IBLA 89-137 Decided january 3, 1991

Appeal from a decision of the Nevada State Office, Bureau of Land Management, declaring mining claims null and void ab initio. NMC 511417, NMC 511418.

Affirmed as modified.

1. Federal Land Policy and Management Act of 1976: Withdrawals--Withdrawals and Reservations: Authority to Make--Withdrawals and Reservations: Revocation and Restoration

   Where a statute withdrawing public lands expressly provides that the withdrawal and segregation of the public lands shall terminate on a date certain and, further, that the withdrawal may not be extended or renewed except by Act of Congress, a mining claim located on the lands after expiration of the withdrawal is not properly invalidated on the ground that the land was not opened by a public land order issued by the Secretary.

2. Federal Land Policy and Management Act of 1976: Recordation of Mining Claim Certificates or Notices
   of Location--Mining Claims: Recordation of Certificate or Notice of Location

   The Federal Land Policy and Management Act of 1976 requires the owner of a mining claim located on public land to file with the proper BLM office a copy of the official record of the notice or certificate of location within 90 days after the date of location. 43 U.S.C. § 1744(b) (1988). The "date of location" of a mining claim is the date determined under state law in the jurisdiction in which the mining claim is situated. 43 CFR 3833.0-5(h). Under Nevada law the date a mining claim is located is the date which is stated in
   the notice of location posted on the claim and repeated in the certificate of location filed with the county recorder. Upon a failure to timely file a copy of the notice of location with BLM, a claim is conclusively deemed abandoned and void.

APPEARANCE: Richard Bargen, M.D., Gabbs, Nevada, for appellants.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Richard Bargen and Grace Bukowski have appealed a decision of the Nevada State Office, Bureau of Land Management (BLM), dated October 28, 1988, declaring the Orange Fire #1 (NMC 511417) and Proctalgia Fugax #2 (NMC 511418) lode mining claims null and void ab initio. The basis of the decision is that when the claims were located the land was not open to mineral entry. The claims were located on June 16, 1988, within the NE¼, sec. 31, T. 5 S., R. 56 E., Mount Diablo Baseline and Meridian, Lincoln County, Nevada.

The land is part of a tract of 89,600 acres which was withdrawn and reserved by Congress in 1984 as the Groom Mountain Addition to the Nellis Air Force Range P.L. 98-485, 98 Stat. 2261. 1/ The legislation provided that the withdrawal of the lands "and the right of their use by the Secretary of the Air Force for the purposes specified * * * terminates on December 31, 1987." P.L. 98-485, § 1(b), 98 Stat. 2261; see 50 FR 896 (Jan. 7, 1985). Congress subsequently extended the expiration date to March 31, 1988 (P.L. 100-202, 101 Stat. 1329, 1329-216), and, then, to June 15, 1988 (P.L. 100-280, 102 Stat. 72). On the latter date the Senate approved legislation amending the Military Withdrawal Act of 1986 (P.L. 99-606, 100 Stat. 3457) to include the Groom Mountain area within the Nellis Air Force Range withdrawal. P.L. 100-338, 102 Stat. 619 (1988). The legislation was signed by the President on June 17, 1988.

BLM's decision stated:

> The termination of a congressional withdrawal does not automatically open the land to the operation of the public land laws, including the mining laws unless it was provided for in the withdrawal legislation, 43 CFR 2091.5-6(a). Public Law 98-485, did not provide for such an opening. In such a case, 43 CFR 2091.5-6(b) provides that the Secretary of the Interior publish an opening order specifying when and to what extent the lands are to be opened. Also, 43 CFR 2091.6 directs that lands included in a withdrawal that terminates do not automatically become open, but are opened through publication in the Federal Register of an opening order.

1/ The land had been withdrawn in 1940 as part of approximately 3.5 million acres set aside for use by the War Department. Exec. Order (EO) No. 8578, 5 FR 4313 (Oct. 31, 1940). The township was excluded when the size of the withdrawal was reduced in 1942. EO No. 9019, 7 FR 238 (Jan. 14, 1942). In 1967 the land was classified for multiple-use management; however, the classification did not segregate the land from mineral entry. 32 FR 8537 (June 14, 1967); 32 FR 5376 (Mar. 30, 1967) (proposed classification). The classification was vacated in 1982. 47 FR 54364 (Dec. 2, 1982).

> Prior to the termination of the Public Law 98-485, Congress had approved Public Law 100-338 which would continue/renew the Groom Mountain Range Withdrawal when signed by the President. Therefore, no opening order for these subject lands was considered for publication and the subject lands remained closed to the operation of the public land laws including the mining laws.

In their statement of reasons for appeal, appellants assert that BLM erred because the express terms, legislative history, and circumstances of the withdrawal show that BLM's application of the regulations is inconsistent with the intent of Congress. Appellants further argue that BLM's decision was arbitrary and capricious because it was made without considering the history and terms of the withdrawal. In support, they have submitted a copy of a September 2, 1988, memorandum from the Director of BLM to the Solicitor requesting advice concerning BLM's "understanding that, even though a congressional withdrawal of lands has expired, the lands are not open to the public land laws or the mining or mineral leasing laws until an opening order is issued." Appellants also have supplied a copy of a memorandum dated October 3, 1988, by which the Solicitor's office responded:

> [Y]ou are correct as to your understanding of the application of 43 C.F.R. § 2091.5-6. Subsection (b) of the regulation recognizes the general rule. See Earl Crecelouis Hall, 58 I.D. 557, 559 (1943), quoted with approval in Petro Leasco, Inc., 42 IBLA 345, 352-353 (1979). Your memorandum does not present for our consideration any statutory language or legislative history that could be construed as manifesting an intent not to follow the general rule in the case of Groom Mountain.
>
> Having plenary authority over federal property, Congress can always depart from the general rule. Thus, each statute, [sic] providing for the expiration or revocation of a withdrawal, should be reviewed with this possibility in mind.

Appellants note that the memorandum did not address the statute and its legislative history, and they assert that BLM also failed to do so prior to issuing its decision. Appellants argue that by failing to issue an opening order for land after the expiration of the withdrawal BLM made an unlawful de facto segregation or withdrawal of the land. Finally, appellants contend that the BLM challenge to their claims was based solely on the lack of an order opening the lands to mineral entry. Appellants assert they "fully complied with all BLM regulations and the mining law pertinent to the location, recording and filing of mineral claims" (Statement of Reasons (SOR) at 5). No response to the statement of reasons has been filed on behalf of BLM.

[1] The Secretary's authority to make, modify, extend, or revoke withdrawals is defined and limited by section 204 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1714 (1988). Of relevance to the present case, the statute provides that "[t]he Secretary shall not

make, modify, or revoke any withdrawal created by Act of Congress; [or] make a withdrawal which can be made only by Act of Congress * * *." 43 U.S.C. § 1714(j) (1988). FLPMA defines a withdrawal as

> withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land, other than "property" governed by the Federal Property and Administrative Services Act, as amended (40 U.S.C. 472) from one department, bureau or agency to another department, bureau or agency.

43 U.S.C. § 1702(j) (1988); see 43 CFR 2300.0-5(h).

The Defense Withdrawal Act (the Engle Act), P.L. 85-336, 72 Stat. 27, codified at 43 U.S.C. §§ 155-158 (1988), requires (except in time of war or national emergency) an Act of Congress to withdraw or reserve public land for the use of the Department of Defense when the result would restrict more than 5,000 acres for any one defense project or facility. 43 U.S.C. § 156 (1988); see Mollohan v. Gray, 413 F.2d 349, 352 (9th Cir. 1969); Portland General Electric v. Kleppe, 441 F. Supp. 859, 862 (D. Wyo. 1977); Department of the Army, 95 IBLA 52 (1986). As noted above, the land was withdrawn by Congress for use by the Air Force in conjunction with the Nellis Air Force Range. The 1984 Act expressly stated: "The withdrawal established by this Act may not be extended or renewed except by Act of Congress." P.L. 98-485, 98 Stat. 2261, 2262. Therefore, under 43 U.S.C. § 1714(j) (1988), the Department was without authority to extend the withdrawal when it expired on June 15, 1988. As the Department could not extend the withdrawal beyond that date, and the legislation to include the land within the Nellis Air Force Range was not enacted into law until approved by the President on June 17, 1988, the withdrawal terminated on June 15, 1988, the date specified by Congress.

We think BLM's decision was based on a misapplication of the regulations at 43 CFR 2091.5-6 and 2091.6. The first of these regulations expressly deals with congressional withdrawals and states:

> (a) Congressional withdrawals become effective and are terminated as specified in the statute making the withdrawal. If the statute does not specify the date, duration and extent of segregation, the Secretary shall publish in the Federal Register a Public Land Order so specifying.
>
> (b) If the statute does not specify when and to what extent the lands are to be opened, the Secretary publishes in the Federal Register an opening order so specifying.

43 CFR 2091.5-6. BLM also relied on the portion of 43 CFR 2091.6 which states that "[l]ands included in a withdrawal that is revoked, terminates

or expires do not automatically become open, but are opened through publication in the Federal Register of an opening order." BLM concluded that, although the land was no longer withdrawn, the land "remained closed to
the operation of the public land laws including the mining laws" because
no opening order had been issued.

The regulation at 43 CFR 2091.5-6(a) explicitly recognizes that congressional withdrawals are "terminated as specified in the statute making the withdrawal." This recognition is compelled by the authority over the public lands vested in Congress by the United States Constitution. U.S. Const., Art. IV, § 3, cl. 2; see Kleppe v. New Mexico, 426 U.S. 529 (1976). The regulation's recognition of the effect of the statutory language defining the duration of the withdrawal is consistent with the direction of Congress in the 1984 Act initially withdrawing the Groom Mountain tract. The withdrawal shall not be extended or renewed except by Act of Congress. This regulatory provision is also consistent with the direction at section 204(j) of FLPMA, 43 U.S.C. § 1714(j) (1988), that the Secretary shall neither modify a withdrawal created by Act of Congress nor make a withdrawal which can only be made by Act of Congress. This latter statutory provision implemented the congressional policy set forth in FLPMA that "the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action." 43 U.S.C. § 1701(a)(4) (1988).

The terms of the statute creating the withdrawal at issue, as amended, expressly provided that the "withdrawal [of the lands] * * * and the right of their use by the Secretary of the Air Force for the purposes specified * * * terminates on June 15, 1988." Under the terms of the regulation at 43 CFR 2091.5-6 (quoted above), the provision for publication in the Federal Register of an order opening the lands does not come into play because Congress specifically stated in the statute the date on which the withdrawal terminates.

This Board has previously had occasion to note the conclusive effect of the statutory term of a withdrawal when reviewing BLM decisions which applied the notation rule to conclude that a public land withdrawal continued after lapse of the statutory term of the withdrawal. Under section 204(b) of FLPMA, 43 U.S.C. § 1714(b) (1988), the filing of an application for withdrawal of public lands shall be announced by notice published in the Federal Register and, upon publication, the lands shall be segregated from operation of the public land laws to the extent specified in the notice. In the absence of withdrawal of the lands by the Secretary or rejection of the application, the statute provides that the "segregative effect of the application shall terminate upon * * * the expiration of two years from the date of the notice." 43 U.S.C. § 1714(b) (1988). The Board held that BLM erred when it applied the notation rule to extend the segregative effect of a withdrawal application beyond the 2-year limit provided by Congress and rejected mining claims located after the statutory expiration of the withdrawal. David Cavanagh, 89 IBLA 285, 300-302, 92 I.D. 564, 573 (1985); see B.J. Toohey, 88 IBLA 66, 95-97, 92 I.D. 317, 334-35 (1985). The same principle applies in the present case. It was error to deem the

land at issue closed to location of mining claims on June 16, 1988. Such a result is inconsistent with the Act and with the regulation at 43 CFR 2091.5-6(a) providing that the duration of a withdrawal and its segregation of the public lands is to be as set forth in the statute.

The cases cited in the Assistant Solicitor's memorandum are properly distinguished and do not support the BLM decision. The decision in Earl Crecelouis Hall, supra, involved lands within odd section statutory grants to a railroad in aid of construction of the railroad. In 1862 and 1864 the lands within the township involved were withdrawn for the railroad, although they were not selected by the railroad until 1938. The Department rejected the selection on the ground the lands were mineral in character. Prior to resolution of the ensuing appeal, the railroad executed a release of all further claims to lands under the statutory grants, including the lands at issue, pursuant to the Transportation Act of September 18, 1940, 54 Stat. 954. The release, which was executed on October 28, 1940, was approved by the Secretary on December 28, 1940. Hall began occupying
the land on October 30, 1940, and filed a homestead entry application on December 15, 1942.

The Hall decision held that the Secretary's approval of the release had "in effect lifted" the withdrawals "and the lands, released from all claims, immediately regained the status of vacant, unappropriated, public lands." 58 I.D. at 559. Nevertheless, Hall noted, "this restoration of the tracts to the public domain did not eo instanti make them subject to classification and disposal under section 7 of the Taylor Grazing Act." Id. at 559. The reason was the notation rule. Citing California & Oregon Land Co. v. Hulen & Hunnicutt, 46 L.D. 55 (1917), the Hall decision stated in a frequently quoted paragraph:

> The Department has also held that orderly administration of the land laws forbids any departure from the salutary rule that lands which have once been segregated from the public domain, whether by entry, patent, reservation, selection or otherwise, shall not be subject to any form of appropriation until the local land officers, acting under instructions from the Commissioner of the General land Office, shall have entered upon the records of the local office proper notation of the restoration of the lands to the public domain.

58 I.D. at 560. 2/ Thus, Hall concluded, due to section 7 of the Taylor Grazing Act, 43 U.S.C. § 315(f) (1988), "notation of a restoration on the

2/ In California & Oregon Land Co. v. Hulen & Hunnicutt, 46 L.D. 55, 56 (1917), the Department held:

"The correct rule is that when a decree canceling a land patent becomes finally effective, the patented lands are thereby restored to the public domain, but they are not thereby restored to appropriation until the local
officers are instructed by the Commissioner that the lands are restored to entry and have in accordance with instructions made notation of restoration upon the records of the local office."

records renders lands subject not to entry but only to classification for some form of entry." Id. at 561. Hall's application had been properly rejected because the lands were not available for classification "for the land office has not yet ordered that their restoration be noted on the records." Id. In addition, it was determined that Hall held no rights based on settlement because section 7 prohibited settlement until the land had been classified for entry. Unlike the case at issue, the Hall decision simply did not involve a statutory withdrawal which by its own terms provided for the expiration of the withdrawal on a certain date.

Similarly, we find the decision in Petro Leasco, Inc., 42 IBLA 345 (1979), to be inapposite to the circumstances of this case. The lands held subject to the requirement of a restoration and opening order in Petro Leasco were reconveyed lands rather than withdrawn lands for which the withdrawal had expired pursuant to the statute creating the withdrawal.

[2] Although we do not agree that appellants' claims were null and void for the reason stated in BLM's decision, we must affirm the decision for another reason. 3/ Section 314(b) of FLPMA requires the owner of an unpatented mining claim located on public land to file with the proper BLM office "within ninety days after the date of location of such claim * * * a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim * * * sufficient to locate the claimed lands on the ground." 43 U.S.C. § 1744(b) (1988). A certificate of location is filed when it is "received and date stamped by the proper BLM office." 43 CFR 3833.0-5(m). The "date of location" of a mining claim is "the date determined by State law in the local jurisdiction in which the unpatented mining claim * * * is situated." 43 CFR 3833.0-5(h).

Nevada law provides that a mining claim is located by monumenting the boundaries of the claim, constructing a location monument, and "[p]osting in or upon the monument of location a notice of the location, which must contain," along with other information, "[t]he date of location." Nev. Rev. Stat. 517.010 (1989). Additionally, Nevada law requires a locator to file with the local country recorder "duplicate certificates of location which contain," along with other information, "[t]he date of the location." Nev. Rev. Stat. 517.050 (1989). These certificates must be filed within 90 days of posting the notice of location. Nev. Rev. Stat. 517.040 (1989).

3/ It is the delegated responsibility of the Board of Land Appeals to decide finally for the Department "as fully and finally as might the Secretary" appeals regarding use and disposition of the public lands and their resources. 43 CFR 4.1. In this capacity, the Board has plenary authority to review the record de novo in deciding pending appeals. United States Fish & Wildlife Service, 72 IBLA 218, 220 (1983). Thus, the Board is not precluded from considering other issues affecting the validity of the claims on appeal. So long as legal title remains in the Government, the Department retains jurisdiction to consider all issues relating to land claims. Schade v. Andrus, 638 F.2d 122, 124-25 (9th Cir. 1981); see Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976).

Federal law requires that a copy be filed with BLM. 43 U.S.C. § 1744(b) (1988); 43 CFR 3833.1-2.

Under Nevada law, the date of location is the date stated in the notice of location posted on the claim and repeated in the certificate of location filed with the county recorder. Boyad Tanner, 113 IBLA 387, 390 (1990); Jim Spicer, 42 IBLA 288 (1979); Southwestern Exploration Associates, 33 IBLA 240 (1977). The copies of the certificates of location appellants filed with BLM state that the claims were located on June 16, 1988. They are date stamped as received by the BLM Nevada State Office on September 19, 1988, 5 days after they were due. Appellants failed to file the documents with BLM within the time provided by law. Failure to file as required by the statute is deemed to conclusively constitute an abandonment of the claim. 43 U.S.C. § 1744(c) (1988); United States v. Locke, 471 U.S. 84 (1985).
We hold that appellants' claims are properly deemed abandoned and are now void. Accord Boyad Tanner, supra; John & Maureen Watson, 113 IBLA 235, 237 (1990); Kerry Shumway, 99 IBLA 156 (1987).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Nevada State Office is affirmed as modified.

C. Randall Grant, Jr.
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge